No. 96-910 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF CHICAGO, *et al.*,
Petitioners,

v.

INTERNATIONAL COLLEGE OF SURGEONS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a federal district court, as a court of original jurisdiction, have jurisdiction to conduct appellate-like review of local administrative agency decisions, when state-court complaints for administrative review also contain federal constitutional allegations?

LIST OF PARTIES

Petitioners properly identify the parties to this proceeding. Pet. ii. This brief in opposition is filed on behalf of the International College of Surgeons, the United States Section of the International College of Surgeons, and Robin Construction Corporation.

RULE 29.6 LISTING

The International College of Surgeons is a not-for-profit corporation of the District of Columbia. It has no parent or subsidiaries. The United States Section of the International College of Surgeons is a not-for-profit corporation of the District of Columbia. It has no parent or subsidiaries.

Robin Construction Corporation is an Illinois corporation. It has no parent or non-wholly owned subsidiaries.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, the International College of Surgeons, the United States Section of the International College of Surgeons, and Robin Construction Corporation (hereinafter the "College"), request that this Court deny the petition for a writ of certiorari filed by the City of Chicago, its Commission on Chicago Historical and Architectural Landmarks, Peter C.B. Bynoe, Joseph A. Gonzales, John W. Baird, Kein L. Burton, Marian Despres, Albert M. Freidman, Seymour Persky, Larry Parkman, Joseph F. Boyle, Jr., and Cherryl Thomas (hereinafter collectively, the "City"), which seeks review of a decision of the United States Court of Appeals for the Seventh Circuit. That opinion is reported at 91 F.3d 981 (7th Cir. 1996).

STATEMENT

In this case, the College has challenged the landmark designation of two buildings on North Lake Shore Drive in Chicago. Pet. App. 2a. The City's instant Petition arose out of two Illinois administrative review appeals from two decisions of the Commission on Chicago Landmarks (the "Commission"), acting under the Chicago Landmarks Ordinance (the "Landmarks Ordinance"). Pet. App. 3a.

Following an administrative hearing, the Commission denied the College's request for demolition permits required to redevelop its landmarked property. The College then sought an economic hardship exception under the Landmarks Ordinance, and again the Commission denied that request after a second hearing. Thereafter, the College, pursuant to the Illinois Administrative Review Act ("IARA"), 735 ILCS 5/3-103, filed two separate "Complaints for Administrative Review" in the Circuit Court of Cook County. Pet. App. 3a-4a, 6a. The City removed the complaints to the federal district court. *Id.*[1] The district court dismissed certain of the College's claims and thereafter entered summary judgment against the College on the remaining claims and affirmed the Commission's decisions denying the College's applications for demolition permits and the economic hardship exception. Pet. App. 4a-5a. On appeal, the Court of Appeals for the Seventh Circuit reversed the judgment of the district court and remanded the case to the Circuit Court of Cook County. Pet. App. 23a. After concluding that an action such as the College's for judicial review under the IARA is essentially an appellate proceeding in which an Illinois court employs a deferential standard of review, Pet. App. 19a, the court held that the College's complaints for administrative review were not "civil action[s] . . . of which the district courts . . . have original jurisdiction" within the meaning of 28 U.S.C. § 1441, and, accordingly, removal was barred. Pet. App. 23a.

[1] The College's motion to remand was denied, Pet. App. 94a-95a, and the district court then consolidated the merits of the issues raised. Pet. App. 4a.

On September 19, 1996, the City filed its Petition for Rehearing with Suggestion for Rehearing En Banc. The panel and the full court denied that petition on November 4, 1996. Pet. App. 97a-98a. The City subsequently moved to stay the issuance of the Seventh Circuit's mandate. Its motion was denied on November 22, 1996. App., *infra*, 1a-3a.

REASONS FOR DENYING THE PETITION

The City's petition for a writ of certiorari is merely a rehash of arguments now thrice-rejected by the Seventh Circuit, first on the decision on the merits, next on the City's petition for rehearing and suggestion for rehearing en banc, and finally on the City's recent motion to stay the Seventh Circuit's mandate. Pet. App. 97a-98a; App. 1a-3a. The City's position in its petition is directly contrary to 1995 decisions of both the First and the Fourth Circuits, as well as this Court's reasoning in *Chicago, Rock Island & Pacific Railroad v. Stude*, 346 U.S. 574 (1954) and *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348 (1961). Concocting a purported conflict in the circuits in an attempt to meet the mandate of Rule 10(a) of this Court, the City relies only on a dated and poorly-reasoned decision by the Eighth Circuit, *Range Oil Supply Co. v. Chicago, Rock Island & Pacific Railroad*, 248 F.2d 477 (8th Cir. 1957), a case contrary to this Court's decision in *Stude* and explicitly rejected as "meaningless" by the panel below, as well as by the Fourth Circuit in *Fairfax County Redevelopment & Housing Authority v. W.M. Schlosser Co.*, 64 F.3d 155 (4th Cir. 1995). The City also effectively ignores numerous cases that hold that district courts are without jurisdiction to review on appeal the findings of state agencies, and, given this well-settled law, offers no valid basis as to how this case could properly be removed to federal court or why this case merits further review by this Court. The City's various policy and other tangential arguments, as set forth below, are equally unconvincing.

I. NO SIGNIFICANT CONFLICT EXISTS AMONG THE CIRCUITS OVER WHETHER FEDERAL DISTRICT COURTS HAVE JURISDICTION TO CONDUCT APPELLATE REVIEW OF STATE AGENCY DECISIONS

The Seventh Circuit's decision in this case is solidly grounded on this Court's decisions in *Chicago, Rock Island & Pacific Railroad v. Stude*, 346 U.S. 574 (1954), and *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348 (1961). *See* Pet. App. 7a-11a. Indeed, as the Seventh Circuit recognized, this Court stated in *Stude* and implied in *Horton* that federal district courts, as courts of original jurisdiction, cannot review on appeal findings of state agencies. *See Stude*, 346 U.S. at 581 ("The United States District Court . . . does not sit to review on appeal action taken administratively or judicially in a state proceeding. A state 'legislature may not make a federal district court, a court of original jurisdiction, into an appellate tribunal. . . .'") (quoting *Burford v. Sun Oil*, 319 U.S. 315, 317 (1943)); *Horton*, 367 U.S. at 354-55 (concluding that a federal district court had jurisdiction over a suit to set aside an administrative award only after concluding that suit was not an appellate proceeding).

Prior to the Seventh Circuit's decision in this case, both the Fourth Circuit and the First Circuit Courts of Appeals had held that an action seeking review of a state administrative agency's decision is not removable where state law provides for deferential review in state court of such decision. *See Fairfax County Redevelopment & Housing Authority v. W.M. Schlosser Co.*, 64 F.3d 155, 158 (4th Cir. 1995); *Armistead v. C & M Transport, Inc.*, 49 F.3d 43, 47-48 & n.4 (1st Cir. 1995).

The Seventh Circuit's opinion also emphasizes that numerous other courts, including the First, Second, Fourth, Fifth, Ninth and Tenth Circuits, have concluded, in various procedural contexts, that district courts are without jurisdiction to review on appeal the findings of state agencies. *See* Pet. App. 15a n.10; *see, e.g., Labiche v. Louisiana Patients' Compensation Fund Oversight Bd.*, 69 F.3d 21, 22 (5th Cir. 1995) (per curiam) ("We

have reviewed [the statutes fixing the jurisdiction of the federal courts] and none would authorize appellate review by a United States District Court of any actions taken by a state agency."); *Armistead*, 49 F.3d at 47-48 & n.4 ("As courts of *original* jurisdiction, federal district courts sitting in diversity do not have appellate power. . . ."); *W.M. Schlosser*, 64 F.3d at 157-58 (collecting cases); *FSK Drug Corp. v. Perales*, 960 F.2d 6, 11 (2d Cir. 1992) ("This Court lacks jurisdiction to hear [appellant's] claim that the [state agency's] substantive decision was arbitrary and capricious."); *Shell Oil Co. v. Train*, 585 F.2d 409, 414-15 (9th Cir. 1978) (holding that federal district court was without jurisdiction to review state agency denial of environmental permit); *Volkswagen de Puerto Rico, Inc. v. Puerto Rico Labor Relations Bd.*, 454 F.2d 38, 42 (1st Cir. 1972) ("To the extent that the federal district court would treat a case removed from the [state court] as a review of a[] [state] administrative decision by giving deference to the [agency's] determination . . . , this would place a federal court in an improper posture vis-a-vis a non-federal agency."); *Trapp v. Goetz*, 373 F.2d 380, 383 (10th Cir. 1966) ("[T]he United States District Court had no power to consider an appeal from the state administrative tribunal. Such a proceeding is not within its statutory jurisdiction."); *cf. Frison v. Franklin County Bd. of Educ.*, 596 F.2d 1192, 1194 (4th Cir. 1979) ("[T]he [district] court should have declined pendent jurisdiction over this state law claim because it is essentially a petition for judicial review of state administrative action rather than a distinct claim for relief.").

Faced with this overwhelming authority, the City's petition relies almost wholly on *Range Oil Supply Co. v. Chicago, Rock Island & Pacific Railroad*, 248 F.2d 477 (8th Cir. 1957). *See* Pet. 9-10. The Seventh Circuit's opinion in this case makes clear that it was fully cognizant of the 40-year-old *Range Oil* decision, but chose, as did the Fourth Circuit in *W.M. Schlosser*, not to follow its faulty reasoning. *See* Pet. App. 15a-16a n.10; *W.M. Schlosser*, 64 F.3d at 158. Indeed, contrary to the City's assertions, *Range Oil* is an anomaly. In fact, as emphasized in *W.M. Schlosser*, *Range Oil* failed to follow this Court's decisions in

Stude and *Horton*. *W.M. Schlosser*, 64 F.3d at 158. In the 40 years since it was decided, this Court has never seen the need to revisit *Range Oil*. No compelling need exists here.

Indeed, the Seventh Circuit properly recognized that *Range Oil* is a mere blip on the screen — the courts of appeals, with the sole exception of *Range Oil*, have consistently held that federal district courts are without jurisdiction to review on appeal findings of state agencies. *See* Pet. App. 15a-16a n.10. The Seventh Circuit emphasized that the court in *Range Oil* failed to consider that the diversity statute vests only "original" and not "appellate" jurisdiction in the district courts. *See id.*; *see also Stude*, 346 U.S. at 581; *Burford*, 319 U.S. at 317; *W.M. Schlosser*, 64 F.3d at 158. The Seventh Circuit correctly concluded: "The *Range Oil* court equates 'original jurisdiction' with the prerequisites of diversity jurisdiction, rendering the former requirement meaningless." *See* Pet. App. 15a-16a n.10.[2]

The City's petition offers no meaningful response to this rejection of *Range Oil*. In light of the recent and abundant authority similarly rejecting *Range Oil*, this Court need not consider the purported circuit split identified by the City. Lower federal courts need no further clarification on this issue given the clear and resounding renunciation of *Range Oil*.

Equally unconvincing is the City's attempt to extend the Seventh Circuit's opinion to federal court review of federal agency action under the federal Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. Pet. at 8-10. While it is settled that 28 U.S.C. § 1331 confers jurisdiction on federal district courts to review federal agency action under the APA, *Califano*

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[2] Moreover, in contrast to the treatise-like examination of pertinent authorities by the Seventh Circuit herein, Pet. App. 7a-16a, and the Fourth Circuit in *W.M. Schlosser*, 64 F.3d at 156-158, with respect to the removability of state administrative appeals, the Eighth Circuit in *Range Oil* cited no authority on the issue other than the language of 28 U.S.C. § 1441.

v. Sanders, 430 U.S. 99, 105 (1977), it is equally well-settled that Section 1331 does not confer such jurisdiction on the district court to review state administrative actions. *See Trapp*, 373 F.2d at 383 ("An appeal from a state administrative board is not a 'civil action' as required by 28 U.S.C.A. § 1331 or § 1332."). Clearly, the Seventh Circuit's opinion — as well as those in *W.M. Schlosser*, *Armistead*, and the legion of other cases holding that the district courts do not have jurisdiction to review on appeal the findings of state agencies, *see* Pet. App. 15a n.10 — was limited to appeals from *state* administrative review proceedings.

Contrary to the City's argument, then, the Seventh Circuit's opinion does not at all implicate *Califano*, standards of review under the APA, or the long line of authority providing parties aggrieved by federal agency action a right to redress in the federal district court, in the absence of a statute to the contrary.[3] *See* Kenneth C. Davis & Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE, § 18.2 (3d ed. 1994). Moreover, when a federal district court reviews the action of a federal agency under the APA, there is no concern that the federal system — through removal — is intruding into the state's system of administrative review. *See* 1A James W. Moore et al., MOORE'S FEDERAL PRACTICE ¶ 157[4.-3] & nn.6-7 ("A statutory proceeding in state court to

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[3] The City intimates that because federal reviewing courts give "deference" to federal agency decisions, the district courts should be free to serve the same quasi-appellate functions vis-a-vis state agencies. Pet. 12-13. This argument is without merit. It is true that Congress, in enacting the scope of review provision of the APA, has specifically allowed that federal district courts shall give certain levels of deference to federal agency decisions. 5 U.S.C. § 706. Thus, a party aggrieved by federal agency action may invoke so-called "non-statutory review" by looking to the general grants of original jurisdiction that apply to the federal courts. A claim for injunctive or declaratory relief in federal district court against a federal agency or officer clearly falls within 28 U.S.C. § 1331. The APA then informs the reviewing court as to the proper standard of review. Obviously, the scope of review provision of the APA does not contemplate district court review of state agency decisions.

review an administrative proceeding is a civil action, *unless the review proceeding is such an integral part of the administrative review process as to constitute a continuation of the administrative proceeding*.") (emphasis added). The Seventh Circuit's opinion makes clear that it was well aware of such concerns. *See* Pet. App. 13a n.9 (collecting cases and other authorities).

II. THE SEVENTH CIRCUIT CORRECTLY HELD THAT THE COLLEGE'S STATE COURT COMPLAINTS FOR ADMINISTRATIVE REVIEW WERE IMPROPERLY REMOVED

Because the College's complaints required a reviewing court to exercise appellate review of the Landmarks Commission's actions under the Illinois Administrative Review Act, 735 ILCS 5/3-103, the cases removed to the district court were held not to be "civil action[s] . . . of which the district courts . . . have original jurisdiction" within the meaning of section 1441(a). Pet. App. 22a. In so holding, the Seventh Circuit was guided by its recent decision in *Frances J. v. Wright*, 19 F.3d 337 (7th Cir.), *cert. denied*, 115 S. Ct. 204 (1994), a case in which "certain aspects of a state proceeding, if segregated from the remainder of that proceeding, could be characterized as a civil action within the original jurisdiction of the district court while other aspects of the same proceeding could not be so characterized." Pet. App. at 20a. There, the court refused to allow removal of a state-court complaint containing claims barred by the Eleventh Amendment and the doctrine of *Hans v. Louisiana*, 134 U.S. 1, 15 (1890), along with claims that were removable under 28 U.S.C. § 1441(a). The court in *Frances J.*, examining the plain language of section 1441(a), interpreted that section as "only authoriz[ing] the removal of *actions* that are within the original jurisdiction of the federal courts." *Frances J.*, 19 F.3d at 340. Accordingly, the court in *Frances J.* held that such a case cannot be removed, stating "if even one claim in an action is jurisdictionally barred from the federal court by a state's sovereign immunity, *or does not fit within the original or supplemental (see 28 U.S.C. § 1367) jurisdiction of the federal court*, then as a

consequence of § 1441(a), the whole action cannot be removed to federal court." *Id.* at 341 (emphasis added).

The Seventh Circuit in the instant case did not allow the City to use the presence of the College's tangential constitutional challenges to the Landmarks Ordinance to override the well-settled rule that a state administrative review case, as an appellate proceeding, cannot be brought into federal court. Again relying on *Frances J.*, the panel held that section 1441(c),[4] which permits removal of otherwise non-removable claims when joined with claims within federal-question jurisdiction, did not provide an alternate basis for removal, since that section likewise "presuppose[s] the existence of a 'civil action.'" Pet. App. 22a. Thus, because the district court could not exercise original jurisdiction over "all issues therein," removal could not be supported by section 1441(c). *Id.*; *see Frances J.*, 19 F.3d at 340 n.4.

The City's argument in Part Two of its petition — that jurisdiction in this case could be premised on 28 U.S.C. § 1331, or, in turn, 28 U.S.C. § 1367 — likewise fails to raise an issue upon which this Court should grant the City's petition. *See* Pet. 14-19. As the Seventh Circuit determined, these sections, as well as section 1441, clearly contemplate the assumption of the responsibilities of a court of *original* jurisdiction by the district court. Pet. App. 22a. The presence of federal constitutional challenges to the Landmarks Ordinance in the College's administrative review complaints cannot cure the jurisdictional bar to

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[4] In *Frances J.*, the court also took into account the possible applicability of section 1441(c) as an alternate basis for removal in that case. *Frances J.*, 19 F.3d at 340 n.4. The court held that, under section 1441(c) as well as section 1441(a), the plain language of the statute created an insuperable barrier to removal. The *Frances J.* court noted that under the language of section 1441(c), "the entire case may be removed and the district court may determine *all* issues therein." *Id.* Because the Eleventh Amendment and the *Hans* doctrine barred some of the claims from *any* adjudication in federal court, reasoned the court in *Frances J.*, the district court could not determine "all issues therein." *Id.*

district court review on appeal of the actions of a state or local administrative commission. Thus, it is not true, as the City argues, that the College's claims fit within the original or supplemental jurisdiction of the federal court under sections 1331 and 1367. Indeed, under the City's approach, the district court would function as both a court of original federal jurisdiction as well as a state quasi-appellate panel. *See* Pet. App. 22a-23a n.14. This is contrary to the teaching of *Stude*, *Horton*, and their progeny.

III. THIS CASE DOES NOT PRESENT AN OPPORTUNITY FOR THIS COURT TO REVISIT *FRANCES J.* AND OTHER CASES ADDRESSING THE PROPRIETY OF REMOVAL OF STATE COMPLAINTS CONTAINING CLAIMS BARRED BY THE ELEVENTH AMENDMENT

The City states that this case presents this Court with the opportunity to revisit *Frances J.* and a split among circuits over the propriety of removal of a state court complaint containing certain claims barred by the Eleventh Amendment. Pet. 18. The issue is not at all cleanly presented here. Indeed, this case did not involve *any* claims barred by the Eleventh Amendment; only the logic and methodology of *Frances J.* applied to this case. *See* Pet. App. 20a-21a. As such, the decision below does not at all implicate the holding of *Frances J.* In fact, the City's Petition is internally inconsistent — at one point the City claims that this case presents an opportunity for plenary review of *Frances J.* (Pet. 18), while at another the City states that "the applicable statutory framework here also distinguishes this case from *Francis J.* [sic] *v. Wright*, upon which the court of appeals heavily relied" (Pet. 17). Thus, contrary to the City's assertion, and by its own admission, this case is not the proper vehicle for review of *Frances J.*, even if such review is warranted or desired by this Court.

Lastly, the City advances the policy argument that the Seventh Circuit's holding divests federal courts of jurisdiction in certain circumstances. *See* Pet. 19-20. This very argument was

rejected by the Fourth Circuit in *W.M. Schlosser* on the basis of *Stude*, was dismissed by the Seventh Circuit below as "vague" (*see* App. 2a), and should similarly be rejected here. *See W.M. Schlosser*, 64 F.3d at 158-59. The opinion below does not "radically circumscribe" (Pet. 19) federal jurisdiction in any way. It was merely a fact-bound application of well-settled law.

The Seventh Circuit properly reversed the district court's opinion and remanded the College's administrative review complaints to the Circuit Court of Cook County. The opinion was correct on the merits and should not be subjected to further review.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 22, 1996

Before

Hon. KENNETH F. RIPPLE, Circuit Judge

INTERNATIONAL COLLEGE OF SURGEONS, a not-for-profit corporation, UNITED STATES SECTION OF THE INTERNATIONAL COLLEGE OF SURGEONS, a not-for-profit corporation and ROBIN CONSTRUCTION CORPORATION, a for-profit corporation,	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Plaintiffs-Appellants,	
Nos. 95-1293 and 95-1315 v.	John F. Grady, *Judge*.
CITY OF CHICAGO, Illinois, a municipal corporation, CHICAGO PLAN COMMISSION, and its Commissioners, REUBEN L. HEDLUND, et al.,	
Defendants-Appellees.	

ORDER

This matter is before me on the motion for the appellees for a stay of the issuance of this court's mandate. *See* Fed. R. App. P. 41(b). A response has been received from the appellants.

The underlying facts of this case are set forth in plenary fashion in this court's opinion. *See International College of Surgeons v. City of Chicago*, 91 F.3d 981 (7th Cir. 1996). The court subsequently denied a petition for a rehearing and no judge in active service requested a vote on the suggestion for rehearing en banc.

As the parties note, the standards that govern a decision on a motion for stay of mandate pending petition for a writ of certiorari are well-established. *See Williams v. Chrans*, 50 F.3d 1358, 1360 (7th Cir. 1995) (per curiam); *United States v. Holland*, 1 F.3d 454, 456 (7th Cir. 1993) (Ripple, J., in chambers). As the appellees note in their motion, these criteria essentially require that the moving party establish that it will experience irreparable injury and that it has a reasonable probability of succeeding on the merits before the Supreme Court of the United States.

The appellees have not carried their burden with respect to either of these criteria. It is not at all clear that they will be damaged, much less irreparably, by whatever proceedings take place in this case while their petition for certiorari is pending in the Supreme Court of the United States. Their suggestion that the issuance of the mandate will affect other cases is far too vague to support the relief requested here.

Nor have the appellees made a convincing case that there is a probability that four Justices of the Supreme Court will vote to grant certiorari or that, if certiorari were granted, five Justices would vote to reverse the judgment of this court. As the appellants point out in their response, the principal holding of this court is compatible with the weight of authority. *See International College of Surgeons*, 91 F.3d at 990 n.10.

The appellees also suggest that the Supreme Court will also review our reliance on *Frances J. v. Wright*, 19 F.3d 337 (7th Cir.), *cert. denied*, 115 S. Ct. 204 (1994). When the Supreme Court denied certiorari in *Frances J.*, it was aware that not all circuits took the same approach. Judge Flaum had addressed the matter squarely in *Frances J.*, 19 F.3d at 341. Moreover, *Frances J.* does not stand alone on the legal landscape. Finally, the opinion

of this court quite adequately sets forth why the logic and methodology of *Frances J.* prohibit removal in this case. *See International College of Surgeons*, 91 F.3d at 993-94.

Because the appellees have failed to carry their burden of establishing that they will suffer irreparable injury or that they have the requisite probability of success on the merits in the Supreme Court, the motion for stay must be denied.

MOTION FOR STAY DENIED